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DEC 18 2006

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY *[Signature]*

**BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA**

No. 05-2227

IN THE MATTER OF A SUSPENDED
MEMBER OF THE STATE BAR OF
ARIZONA,

BRADFORD T. BROWN,
Bar No. 009034

RESPONDENT.

**HEARING OFFICER'S REPORT
AND RECOMMENDATION**

Procedural History

The State Bar of Arizona (the State Bar) filed the single count complaint in this case in August of 2006. The complaint was served upon the Respondent in a manner permitted by Rule 47(c). When Respondent failed to file an answer, the Disciplinary Clerk issued a notice of default and on October 3, 2006, served a copy upon the Respondent. When still no answer was filed, Respondent's default was entered in accordance with Rule 57(b) on October 25, 2006. Since neither the State Bar nor the Respondent requested an aggravation/mitigation hearing, none was conducted.¹

Findings of Fact

The Respondent being in default, the allegations of the complaint are deemed admitted pursuant to Rule 57(d). Based upon the admissions, the Hearing Officer makes the following findings of fact:

¹ The Hearing Officer did not order a hearing *sua sponte* since it seemed unlikely Respondent would participate. Without Respondent's participation, a hearing would have served no purpose other than to delay this matter.

1 1. At all relevant times, Respondent was a member of the State Bar of
2 Arizona, licensed to practice law and having been admitted to practice in Arizona on
3 October 15, 1983.
4

5 2. On December 23, 2005, the State Bar received a charge against
6 Respondent from Nico DeGroot (Mr. DeGroot) by letter dated December 17, 2005.

7 3. Mr. DeGroot is the father of Michael Glen DeGroot (Michael), who was
8 at that time a criminal defendant in Yuma County.
9

10 4. Mr. DeGroot had authorization from Michael to discuss Michael's case
11 with Respondent on Michael's behalf.

12 5. Respondent was then serving as the attorney for Michael, having
13 been appointed or retained to represent Michael during 2004 or 2005.

14 6. Mr. DeGroot's charge alleged that Respondent had failed to
15 communicate with Michael, or Mr. DeGroot, had failed to abide by Michael's wishes
16 regarding the representation, and was not acting diligently.
17

18 7. By letter dated January 3, 2006, the State Bar informed Respondent
19 of the charge and requested that Respondent contact Mr. DeGroot within 15 days
20 providing the State Bar with copy of his correspondence with Mr. DeGroot, or
21 explain to the State Bar how he had addressed the matter.
22

23 8. Respondent failed to provide the State Bar with the requested
24 information.

25 9. The State Bar received, by letters from Mr. DeGroot dated December
26 31, 2005, and January 3, 2005, further complaints from Mr. DeGroot that
27 Respondent was still not adequately communicating with him.
28

1 10. By letter dated February 24, 2006, the State Bar again requested that
2 Respondent provide information regarding his contact with Mr. DeGroot in the form
3 of copies of the correspondence, or an explanation of how Respondent was dealing
4 with DeGroot's complaints.
5

6 11. Respondent did not respond.

7 12. By letter dated April 12, 2006, Respondent was notified that the State
8 Bar was initiating a formal investigation based on the information received from Mr.
9 DeGroot. Respondent was directed to respond within 20 days of the date of the
10 letter.
11

12 13. Respondent did not respond.

13 14. By letter dated May 15, 2006, Respondent was reminded of his
14 obligation to promptly and fully respond and to cooperate with the investigation of
15 the State Bar pursuant to Rule 53, Ariz.R.Sup.Ct.
16

17 15. Respondent did not respond.

18 16. By letter dated May 31, 2006, Respondent was again requested to
19 respond to the State Bar no later than June 7, 2006. Respondent was advised that
20 his failure to respond would be considered deliberate.
21

22 17. Respondent did not respond.

23 18. There is no allegation in the complaint, or independent evidence, that
24 Respondent's misconduct caused any actual harm.

25 19. Respondent was informally reprimanded on April 16, 1993 (SB-92-
26 1718) for violations of ERs 1.1 (competence), 1.3 (diligence) and 1.4
27 (communication) in connection with his representation of a domestic relations client.
28

20. Respondent was informally reprimanded on January 11, 2001, (SB-98-1674) for violation of ERs 1.4 (communication), 1.5 (failure to safeguard client property) and 1.16 (failure to promptly return client property).

21. Respondent was censured on December 9, 2003, SB-03-0143-D) for violations of ERs 5.5 (unauthorized practice); 8.4(c)(conduct involving dishonesty, fraud, deceit or misrepresentation); 8.4(d) (conduct prejudicial to the administration of justice); Rule 51(b) (violation of rules of professional conduct); Rule 51(c) (disobedience of a court rule); Rule 51(f) (violation of disciplinary rule); Rule 51(h) (failure to furnish information) and Rule 51(i) (failure to cooperate).²

22. On September 22, 2006, the Respondent was summarily suspended from the practice of law by the Board of Governors pursuant to Rule 62 for failure to pay a mandatory continuing legal education late fee.

Conclusions of Law

There is clear and convincing evidence that Respondent violated Rule 42, Ariz.R.Sup.Ct., as follows:

Respondent's failed to reasonably communicate with his client and to provide prompt information about the status of his client's case in violation of ER 1.4.

Respondent failed to cooperate with bar counsel, acting in the course of bar counsel's duties; failed to furnish information or promptly respond to questions and requests for information from bar counsel in violation of Rules 53(d) and (f), Ariz.R.Sup.Ct.

² The 2003 amendments to the disciplinary rules moved the content of old Rule 51 into new Rule 53. A failure to furnish information is now covered by Rule 53(f), while a failure to cooperate is covered by Rule 53(d).

Recommended Sanction

A. Applicable Standards

The Supreme Court and the Disciplinary Commission consistently use the Standards for Imposing Lawyer Sanctions (Standards) to determine appropriate sanctions for attorney discipline. See *In re Clark*, 207 Ariz. 414, 87 P.3d 827 (2004). The Standards are designed to promote consistency in sanctions by identifying relevant factors the court should consider and then applying these factors to situations where lawyers have engaged in misconduct. Standard 1.3, Commentary.

In determining an appropriate sanction, the Court and the Disciplinary Commission consider the duty violated, the lawyer's mental state, the presence or absence of actual or potential injury, and the existence of aggravating and mitigating factors. *Peasley*, 208 Ariz. at ¶33, 90 P.3d at 772; Standard 3.0.

The Standards do not account for multiple charges of misconduct. The ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations and it might well be, and generally should be, greater than the sanction for the most serious conduct. Standards, p. 6 *In re Redeker*, 177 Ariz. 305, 868 P.2d 318 (1994).

Respondent's failure to communicate with his client is not his most serious violation. More serious is his failure to cooperate with the State Bar during the investigation of this case and provide the information requested of him by bar counsel. The Supreme Court has held that a lawyer's failure to respond to State

1 Bar inquiries borders on contempt of the legal system. (*In re Galusha*, 164 Ariz.
2 503, 794 P. 2d 136 (1990)).

3 Respondent's violations of Rule 53, Ariz.R.Sup.Ct., implicate Standards 7.2 and
4 7.3, that provide, respectively,
5

6 (7.2) Suspension is generally appropriate when a lawyer
7 knowingly engages in conduct that is a violation of a duty
8 owed to the profession, and causes injury or potential
9 injury to a client, the public, or the legal system.

10 (7.3) Reprimand (censure in Arizona) is generally
11 appropriate when a lawyer negligently engages in
12 conduct that is a violation of a duty owed to the
13 profession, and causes injury or potential injury to a
14 client, the public, or the legal system.

15 To determine which Standard applies, a determination must be made as to whether
16 Respondent's state of mind was negligent or knowing.
17

18 **B. State of Mind**

19 There is nothing in the limited record in this case to support a conclusion that
20 Respondent's state of mind was other than knowing. Respondent's failure to
21 communicate with his client and his failure to respond to the State Bar can only be
22 characterized as intentional.
23

24 Respondent has been disciplined on three prior occasions, the last of which
25 was a censure based in part on the same misconduct that initiated this complaint; a
26 failure to communicate with or cooperate with the State Bar. Respondent was told in
27 the State Bar's letter of May 31, 2006, that his failure to respond would be presumed to
28 be deliberate. The Respondent had to know he was obligated to respond to bar
counsel's requests and cooperate in the investigation. For whatever reason,
Respondent made a conscious decision not to do so.

1 Since Respondent's conduct was knowing rather than negligent, Standard
2 7.2 applies and the presumptive sanction is suspension.³

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4 **C. Aggravating and Mitigating Factors**

5 There are four aggravating factors present in this case; a history of prior
6 discipline (Standard 9.22(a); a pattern of misconduct (Standard 9.22(c); bad faith
7 obstruction of the disciplinary proceedings (Standard 9.22(e) and substantial
8 experience in the practice of law (Standard 9.22(i).

9
10 In addition to the censure imposed in 2003 for, among other things, failure to
11 cooperate with and respond to the State Bar in violation of Rule 53(d) and (f),
12 Respondent has twice been informally reprimanded for the same misconduct that
13 underlies this case; violations of ER 1.4 (communication).

14 The continuation in this case of the misconduct that was the basis for
15 Respondent's prior discipline shows a pattern of misconduct. Specifically, repeated
16 failures to communicate with clients and repeated failures to cooperate with the State
17 Bar in the investigation of disciplinary complaints. The fact that Respondent
18 intentionally ignored the State Bar in this case just as he did before also demonstrates
19 a bad faith obstruction of the disciplinary process. Respondent has substantial
20 experience in the practice of law, having been a lawyer for over 23 years.

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23 There are no factors in mitigation. Suspension, therefore, remains the
24 appropriate presumptive sanction. The issue now becomes whether suspension is a
25 proportional sanction and if so, the appropriate length of the suspension.
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³ Suspension is also indicated because Respondent has been censured for similar misconduct a
violation of Rule 53(d) and (f). See Standard 8.2.

1 **D. Proportionality**

2 The Supreme Court consults similar cases in an attempt to assess the
3 proportionality of the sanction recommended. See *In re Struthers*, 179 Ariz. 216, 226,
4 887 P.2d 789, 799 (1994). The Supreme Court has recognized that the concept of
5 proportionality review is "an imperfect process." *In re Owens*, 182 Ariz. 121, 127, 893
6 P.3d 1284, 1290 (1995), because no two cases "are ever alike." *Id.*

7
8 To have an effective system of professional sanctions, there must be internal
9 consistency, and it is appropriate to examine sanctions imposed in cases that are
10 factually similar. *Peasley, supra*, 208 Ariz. at ¶ 33, 90 P.3d at 772. However, the
11 discipline in each case must be tailored to the individual case, as neither perfection nor
12 absolute uniformity can be achieved. *Id.* at 208 Ariz. at ¶ 61, 90 P.3d at 778 (citing *In*
13 *re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines*, 135 Ariz. 203, 207,
14 660 P.2d 454, 458 (1983)).

15
16
17 The State Bar recommends a suspension of six months and one day,⁴ plus a
18 two year term of probation on reinstatement. In support of the proportionality of the
19 recommended sanction, the State Bar cites three cases. Each is considered below.

20 In *In re MacDonald*, SB-03-0082-D (2003), the lawyer was suspended for 30
21 days by consent agreement for violations including failure to perform services
22 requested by his client, failure to communicate with his client and failure to keep his
23 client advised as to the status of her case. The lawyer also failed to cooperate with the
24 State Bar during their investigation. However, unlike the Respondent here, the lawyer
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 ⁴ Thus requiring Respondent to prove rehabilitation prior to reinstatement, see Rule 64(e).

1 did participate in the formal disciplinary proceedings and admitted his misconduct.
2 There also were mitigating factors present there that are not present here.

3 In *In re Hatfield*, SB-04-0010-D (2004), the lawyer was suspended for 30 days
4 by consent agreement for violations including failure to adequately communicate with
5 her client and represent her client's interests, as well as for failure to cooperate with
6 the State Bar's investigation. But in that case the lawyer did participate in the formal
7 discipline proceedings and did admit her misconduct. As in *MacDonald*, a number of
8 mitigating circumstances were present that are not present here.

9 In *In re Clark*, SB-03-0107-D (2003), the lawyer was suspended for 60 days for
10 violations that included failure to communicate with his clients and failure to respond to
11 or cooperate with the State Bar. A number of aggravating factors were found,
12 including prior disciplinary offenses, as well as a number of mitigating circumstances.

13 Three other cases are helpful in evaluating the proportionality of the State
14 Bar's proposed sanction.

15 In *In re Thomas T. McDaniel* (SB05-0134-D), the Disciplinary Commission
16 approved an agreement for discipline by consent for a suspension of six months
17 and one day in a case where the lawyer failed to act competently and diligently,
18 failed to communicate with his clients and failed to cooperate with the State Bar.
19 The matters in aggravation were virtually the same as those here, but there were six
20 matters in mitigation. In addition, there was a finding that the lawyer's conduct
21 caused actual harm to his clients.

22 Similarly, in *In re Brown* (SB04-0121-D), an agreement for a suspension of
23 six months and one day was approved in a case where the lawyer committed a
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1 criminal act in recording a telephone conversation without the other party's
2 knowledge and found to be in contempt of court for failure to pay child support and
3 alimony and failed to cooperate with the State Bar. There were only two matters in
4 aggravation and one matter in mitigation, but there was a finding of actual harm to
5 the client.
6

7 In *In re Clark* (SB04-0086-D), the Disciplinary Commission overruled
8 the Hearing Officer's recommendation of a suspension of six months in favor of a
9 suspension of six months and one day in a case involving multiple acts of serious
10 misconduct followed by a failure to cooperate with the State Bar. The matters in
11 aggravation in that case were essentially the same as here and, there were no
12 matters in mitigation. But in that case, there was also a finding of actual harm to the
13 client.
14

15 **E. Recommended Sanction.**
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17 The Hearing Officer has been unable to find a case comparable to this case
18 where a sanction of a suspension of six months and one day has been imposed.
19 Cases where a suspension of that magnitude has been imposed all involve a
20 combination of serious underlying conduct, actual rather than just potential harm
21 and a failure to respond to, or cooperate with, the bar. That combination is not
22 present in this case. Here there is the potential for harm, but no evidence that
23 Respondent's underlying misconduct (communication) was particularly serious or
24 caused any actual harm to his client.⁵ Respondent's failure to cooperate with the
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⁵ Since Respondent never replied to the State Bar, there was no determination of merits of the underlying complaint. There is no allegation of actual harm in the complaint, and the Hearing Officer

1 State Bar caused actual harm only to himself by parlaying a minor communication
2 violation, that may or may not have had merit, into a career altering event. But self-
3 inflicted actual harm to the Respondent does not equate to actual harm to his client
4 or the profession.
5

6 If this case involved serious underlying misconduct and actual harm, the
7 State Bar's recommended sanction would be proportional with the results in
8 *McDaniel, Brown and Clark (SB-04-0086-D)*. But it does not. Rather, the facts here
9 come closer to those in *MacDonald, Hatfield and Clark (SB-06-0127-D)*. The
10 Respondent's conduct is more serious than the conduct in those three cases
11 because here the Respondent's misconduct is a reoccurrence of his prior
12 misconduct and thus cumulative. Attorneys who exhibit cumulative misconduct
13 must be dealt with severely (Commentary, Standard 8.2). Therefore, a period of
14 suspension longer than the 60 days ordered in *Clark (SB-06-0127-D)*, but shorter
15 than the six months and one day ordered in *McDaniel, Brown and Clark (SB-04-*
16 *0086-D)* is appropriate and proportional.
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19 On the basis of facts deemed admitted, factors in aggravation and
20 proportionality considerations, the Hearing Officer recommends the Respondent be
21 suspended for a period of four months, to commence no sooner than upon the
22 expiration of his current summary suspension. As nothing in the record suggests
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assumes if there was any evidence of actual harm, the State Bar would have requested an
aggravation hearing to present it.

1 restitution is appropriate, none is recommended. ⁶

2 Dated this 14th day of December, 2006.

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6
Larry W. Suci
Hearing Officer 7A

7 Original filed with the Disciplinary Clerk
8 this 18 day of December, 2006.

9 Copy of the foregoing mailed this 18
10 day of December, 2006, to:

11 Bradford T. Brown
12 Yuma County Public Defender
13 201 South Second Avenue
14 Yuma, AZ 85364-2213
15 Respondent

16 Copy of the foregoing hand delivered
17 this 18 day of December, 2006, to:

18 Roberta L. Tepper, Esq.
19 State Bar of Arizona
20 4201 North 24th Street, Suite 200
21 Phoenix, AZ 85016-6288
22 Bar Counsel

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24
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26
27
28
By 

⁶ Since Respondent works as a public defender, it is unlikely he was paid a fee by Mr. DeGroot or Michael.